IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 2 *et al.*, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	Civil Action No. 17-cv-1597 (CKK)

PLAINTIFFS' RESPONSE TO GOVERNMENT'S NOTICE [DKT. 190]

The government has notified the Court that the Department of Defense intends to issue a directive implementing the Mattis Plan "in the near future," contending that this Court's preliminary injunction is no longer in effect. But, as the government acknowledges, the D.C. Circuit has not issued its mandate. Nor has any court issued a stay of that injunction.[1] As a result, this Court's injunction remains in effect. While that injunction stands, the government is not free to act contrary to its terms.

Federal Rule of Appellate Procedure 41(c) provides: "The mandate is effective when issued." As the advisory committee notes to that rule make clear, "[a] court of appeals' judgment or order is not final until issuance of the mandate; *at that time* the parties' obligations become fixed." Fed. R. App. P. 41(c) advisory committee's note (1998) (emphasis added). Courts have consistently recognized that "[a]n appellate court's decision is not final until its mandate issues." *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 97 (3d Cir. 1988); *see also United States v. DeFries*, 129 F.3d 1293, 1302 (D.C. Cir. 1997); *Natural Resources Defense Council, Inc. v. County of Los Angeles*, 725 F.3d 1194, 1203 (9th Cir. 2013) ("No opinion of this

[1] The Chief Justice denied the government's motion to stay the injunction. *See* Exh. A.

circuit becomes final until the mandate issues[.]" (alteration in original) (internal quotation marks omitted)); *United States v. Jackson*, 549 F.3d 963, 980 (5th Cir. 2008) ("This Court's decisions are not final until we issue a mandate." (internal quotation marks omitted)); *Flagship Marine Servs., Inc. v. Belcher Towing Co.*, 23 F.3d 341, 342 (11th Cir. 1994) ("Until the mandate issues, an appellate judgment is not final; the decision reached in the opinion may be revised by the panel, or reconsidered by the en banc court[.]").[2]

In addition to lacking any legal basis, the government's position is belied by its own statement of the facts. The government states that the Department of Defense intends to issue a directive implementing the Mattis Plan "in the near future," which "will not take effect until 30 days after its release." That schedule does not warrant disregarding the ordinary procedures that operate to safeguard the Plaintiffs' serious constitutional interests in this case. Plaintiffs are considering their options with respect to rehearing; given the short time allowed for that consideration—17 days at this point—the government will suffer no prejudice if it waits to issue its directive. The constitutional rights and livelihoods of thousands of prospective and current transgender servicemembers are at stake, and no one—neither Plaintiffs, nor the government, nor

[2] The government's notice of appeal from this Court's order refusing to dissolve the injunction divested this Court of jurisdiction over the injunction except to maintain the status quo. *DeFries*, 129 F.3d at 1302. Under Federal Rule of Civil Procedure 62(d), this Court retains limited jurisdiction pending appeal to "suspend, modify, restore, or grant" an injunction—but *only* to maintain the status quo pending appeal. *See Coastal Corp. v. Texas Eastern Corp.*, 869 F.2d 817, 820 (5th Cir. 1989) ("Having reviewed the existing case law throughout the circuits and paying proper respect to Rule 62(c), we are persuaded that the powers of the district court over an injunction pending appeal should be limited to maintaining the status quo[.]"); *International Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Eastern Air Lines, Inc.*, 847 F.2d 1014, 1018 (2d Cir. 1988) (stating that Rule 62(c) "has been narrowly interpreted to allow district courts to grant only such relief as may be necessary to preserve the status quo pending an appeal where the consent of the court of appeals has not been obtained").

the public—would benefit under a scenario where the government proceeds as if the injunction has been dissolved, but subsequent proceedings result in the reinstatement of the injunction.

The D.C. Circuit's denial of the government's stay motion as moot offers no support for the government's position. The court stated no reason for its denial. The court may have denied the government's stay motion as moot because that motion sought a stay pending the court's decision; with the decision having issued, the stay request no longer needed to be decided. Alternately, the court may have concluded that its vacatur of the injunction mooted any purported urgency of a stay pending further appeals. In either case, the government was free to move for expedited issuance of the mandate, but it did not do so.

Because the injunction remains in effect, the government may not depart from the status quo or implement any new policy inconsistent with that injunction until the court of appeals issues its mandate.

March 12, 2019

Respectfully submitted,

/s/ Paul R.Q. Wolfson

Paul R.Q. Wolfson (D.C. Bar No. 414759)
Kevin M. Lamb (D.C. Bar No. 1030783)
WILMER CUTLER PICKERING
HALE & DORR LLP
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006
Telephone: 202-663-6000
Fax: 202-663-6363

Alan E. Schoenfeld (*pro hac vice*)
WILMER CUTLER PICKERING
HALE & DORR LLP
7 World Trade Center
250 Greenwich St.
New York, New York 10007
Telephone: 212-230-8800
Fax: 212-230-8888

Adam M. Cambier (*pro hac vice*)
WILMER CUTLER PICKERING
HALE & DORR LLP
60 State Street
Boston, Massachusetts 02109
Telephone: 617-526-6000
Fax: 617-526-5000

Attorneys for Plaintiffs

Matthew E. Miller (*pro hac vice*)
Kathleen M. Brill (*pro hac vice*)
Michael Licker (*pro hac vice*)
Rachel C. Hutchinson (*pro hac vice*)
FOLEY HOAG LLP
155 Seaport Blvd.
Boston, Massachusetts 02210
Telephone: 617-832-1000
Fax: 617-832-7000

Theresa M. Roosevelt (D.C. Bar No. 1021853)
FOLEY HOAG LLP
1717 K Street NW
Washington, DC 20006
Telephone: 202-223-1200
Fax: 202-785-6687

Jennifer Levi (*pro hac vice*)
Mary L. Bonauto (*pro hac vice*)
GLBTQ LEGAL ADVOCATES & DEFENDERS
18 Tremont St., Ste. 950
Boston, Massachusetts 02108
Telephone: 617-426-1350
Fax: 617-426-3594

Shannon P. Minter (*pro hac vice*)
Amy Whelan (*pro hac vice*)
Chris Stoll (*pro hac vice*)
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market St., Ste. 370
San Francisco, California 94102
Telephone: 415-392-6257
Fax: 415-392-8442